Supreme Court, U.S.
FILED

98 2 0 19 JUN 16 1999

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

LEVY JAMES III,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

PETITION FOR A WRIT OF CERTIORARI

ROBERT H. CITRONBERG
Attorney for Petitioner
Suite 1950
100 Peachtree Street, N.W.
Atlanta, Georgia 30303
(404) 522-7450

153447

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

38 pp

QUESTION PRESENTED

Do continuous unconstitutionally adverse rulings on a criminal defendant's motions for mistrial and other evidentiary matters as well as the exclusion of expert testimony on the potential effect of controlled substance ingestion on an alleged victim deny the defendant his due process right to a fair trial?

PARTIES TO THE PROCEEDING

1. Mr. Robert H. Citronberg, Esq., Counsel for Petitioner.

2. Mr. Robert Coker, Esq., Dekalb County District Attorney, Appellate Counsel for the State.

3. Mr. Levy James III, Petitioner/Defendant.

4. Mr. Robert Statham, Esq., Dekalb County District Attorney, Trial Counsel for the State.

5. Ms. Jeanne Strickland, Esq., Assistant Attorney General, State of Georgia.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Cited Authorities	iv
Table of Appendices	vi
Opinions Below	1
Statement of Jurisdiction	1
Constitutional Provisions Involved	1
Statement of the Case	1
Reasons for Granting the Writ	6
The Petition Should Be Granted Because The Exclusion Of Evidence Coupled With The Continual Denials Of Petitioner's Motions For Mistrial And Other Evidentiary Errors Denied Him A Trial In Accord With Traditional And Fundamental Standards Of Due Process.	6
Conclusion	8

TABLE OF CITED AUTHORITIES

Page

Cases:

Barefoot v. Estelle, 697 F.2d 593 (5th Cir. 1983) .. 8

Chambers v. Mississippi, 410 U.S. 284, 294 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) 6, 7

Crane v. Kentucky, 476 U.S. 683, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986) 7, 8

In re Murchison, 349 U.S. 133, 75 S. Ct. 623, 99 L. Ed. 942 (1955) 8

Little v. Johnson, 162 F.3d 855 (5th Cir. 1998) 8

Montana v. Egelhoff, __ U.S. __, 116 S. Ct. 2013, 135 L. Ed. 2d 361 (1996) 6, 7, 8

Parker v. Gladden, 385 U.S. 363 (1966) 8

Turner v. Louisiana, 379 U.S. 466, 85 S. Ct. 546 (1965) 8

Washington v. Texas 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967) 8

Cited Authorities

Page

Statute:

28 U.S.C. § 1257 1

United States Constitution:

Sixth Amendment 1

Fourteenth Amendment 1

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The Supreme Court Of Georgia Dated And Decided March 1, 1999 .... 1a

Appendix B — Excerpts From Trial Transcript ... 10a

Appendix C — Order Of The Supreme Court Of Georgia Denying Motion For Reconsideration Dated March 18, 1999 ..... 21a

OPINIONS BELOW

The opinion of the Supreme Court of Georgia is reported at __ Ga. __, (1999), 513 S.E.2d 207 (Ga. 1999) (App. A). Excerpts from the trial court appear in the Appendix (App. B). The decision of the Supreme Court of Georgia denying reconsideration on March 18, 1999 is contained in the Appendix (App. C).

STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Georgia was entered on March 1, 1999. A timely petition for reconsideration was denied on March 18, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where the crime shall have been committed.

The Fourteenth Amendment to the United State Constitution provides in pertinent part: "[n]or shall any State deprive any person of life, liberty, or property without due process of law."

STATEMENT OF THE CASE

On April 24, 1996, Petitioner Levy James III arrived at a shoe hospital belonging to Mr. Steven Hood (hereinafter referred to as the decedent). The shoe hospital was located in a strip mall in Dekalb County, Georgia. Mr. James (hereinafter referred to as the Petitioner), who considered Mr. Hood a friend, began to talk to individuals who were

already in the shoe hospital. Shortly after Petitioner arrived, he was asked by the decedent to move his car which he had parked in the drive through area of the hospital where witnesses testified others had parked in the past. Those present at or in the vicinity of the shoe hospital included the decedent's fiancee, and a number of acquaintances of the Petitioner and the decedent. The Petitioner, who had begun eating, was asked to move his car by the decedent. After not immediately moving his car, the Petitioner was confronted by the decedent who again demanded the vehicle be moved. As Petitioner had begun to exit the shoe repair to move his vehicle the decedent followed him outside the door. Outside the store the conversation grew more heated, with the decedent indicating he would "whoop [the Petitioner's] ass". Petitioner then entered his vehicle, and was asking that the decedent "get out of his face", as well as telling the decedent five times he needed to get away from his car. Nonetheless the decedent, who could have walked away, continued to argue. One individual tried to get the decedent to walk away, and asked the decedent to "let it go", but the decedent refused and returned back towards the Petitioner's car, where he was now seated. After more arguing, the Petitioner pulled out a weapon which he did not point at the decedent. To this action, the decedent responded "So what, you going to shoot me, then shoot me . . . you won't fight me like a man . . . you know I'll whip your ass if you fight me like a man." The argument continued and the Petitioner ultimately fired the weapon several times. One witness indicated that he saw the decedent "go toward the window of the car and that's when the gunshots started going off", and that the decedent reached in the car, and that's when he was shot, although other witnesses had different recollections. After the shots were fired some witnesses alleged the Petitioner stepped from his vehicle and made some type of remark to the decedent. The decedent died having received eight gunshot wounds, although the medical examiner could not state in which order the wounds were received by the decedent.

Prior to trial, the Petitioner notified the court and opposing counsel that he would seek to introduce the testimony of Dr. John Holbrook. Dr. Holbrook is employed by the Mercer University School of Pharmacy and the Department of Pharmaceutical Sciences. He is professor in the Department of Pharmaceutical Sciences and Director of the Center of Substance Abuse and Research. Dr. Holbrook proffered testimony was that he had conducted research into the effects of marijuana on animals, and had reviewed articles on the effect of marijuana in human beings. He proffered that marijuana's active agent, delta-9 THC can have a variety of effects on the human being — it can be a depressant, it can be hallucinogenic, or it might produce a euphoric state. The depressant effect can cause a disinhibition of behavior, similar to the effects of alcohol. Dr. Holbrook would have testified that marijuana effects the ability to think and reason, and that this disinhibition can result in a person taking risks, as well as affecting a person's ability to think and reason. Marijuana usage may also cause an individual to exert behavior that they would normally have under control. Doctor Holbrook testified that the autopsy results of the decedent indicated that the he had a THC level of 50-100 nanograms per milliliter in his blood, which he characterized as a moderately high dose, and that dose could have caused the disinhibition of behavior referred to in his earlier testimony. On cross examination, Dr. Holbrook indicated that the dosage in question would have indicated that the person would have smoked the substance recently, or was a chronic user who had smoked it in the last few days. Despite the contentions of the Petitioner, the court declined to allow the testimony of Dr. Holbrook or the introduction of evidence of the amount of marijuana in the bloodstream of the victim. The trial court excluded such testimony from evidence (Motion hearing pp. 162-163).

Prior to the trial of the case at bar, Petitioner filed a number of motions that were granted by the trial court. These

included a Motion to Enjoin the Victims family from showing Emotion in the Courtroom While Sitting as Spectators, a Motion in Limine to Restrict the Use of the Word "Murder" and a Motion to Prohibit Jury's Exposure to Victim's Family or Friends". All the Petitioner's motions were granted. All the court's rulings were violated.

On the first day of trial, early in jury selection, counsel for Petitioner noticed that family members of the decedent had entered the courtroom and were wearing photographs of the decedent. The buttons gave the dates of the birth and death of the decedent, as well as saying in large print "ALIVE IN OUR HEARTS". Counsel asked that the entire panel be dismissed, which was denied. Counsel then established that the entire panel had been potentially exposed to the buttons. Nonetheless, the court refused to dismiss the panels. The trial court did warn that further outbursts by family members would not be tolerated. Later in the voir dire another juror testified that she had seen the pin, when all the prospective jurors were present in the courtroom. The court, despite the fact that this juror had seen the memory pin, and that all the jurors were exposed to it, declined to excuse even the one juror.

One of the first witnesses for the State was Detective Mark Anglin, who immediately testified that his first duty involving this case was to respond to the scene of the "murder". Despite the earlier grant of Petitioner's motion to restrict the use of the word murder, it had been injected into the trial by the State anyway. Counsel for the State stated he had "neglected" to tell the officer of the court's ruling. The trial court again denied Petitioner's motion for mistrial.

Later that day, one of Petitioner's trial counsel was cross-examining a key witness, George Durham. The following colloquy occurred —

Q. (Continued by Mr. Mann) Which occurred? Which is the truth, what you said today in court, or what you said right after the incident? What's the truth?

A. It seemed like to me both. Both of the stories are similar. I had — I had at that particular date, I had just witnessed a close friend of mine get killed, so me exactly pointing out step-by-step what happened, I don't think — it would have been impossible for anybody to do that, Anybody that was there.

AN UNKNOWN OBSERVER: That's right.

Counsel for Petitioner again moved for a mistrial. Counsel for the State conceded that in fact there was an outburst. The outburst was by a member of the decedent's family. The court nonetheless again denied Petitioners motion for mistrial. Petitioner's motion for mistrial specifically cited the Constitutional provisions involved. (T-642).

Later, that same day, during the direct examination of Kendrick Lofton, the District Attorney representing the State of Georgia elicited the following from it's witness:

Q. Okay. Go On. After he said that, what happened?

A. Steve said, well, bust me then . . . And I was — I started crying, because I knew the guy, and it was like, I thought it was just a little arguing or whatnot. And he — I don't know, *he just shot him down like a dog*. (Emphasis supplied). (Petitioner's counsel during trial also unsuccessfully objected to the testimony of the

> decedent's fiancee in identifying a photo of the victim as ". . . the person I loved", as well as a portion of the closing argument intended to evoke sympathy for the family of the victim.)

Counsel again asked for a mistrial citing the Constitutional provisions involved. (T-660). A ruling on Petitioner's motion was reserved at this time, and denied in essence by the denial of Petitioner's motion for new trial before the trial court. Petitioner argued in his brief to the Supreme Court of Georgia that the conduct in this case deprived Petitioner of his rights under the United States and Georgia Constitutions, specifically citing his right to a fair trial.

REASONS FOR GRANTING THE WRIT

THE PETITION SHOULD BE GRANTED BECAUSE THE EXCLUSION OF EVIDENCE COUPLED WITH THE CONTINUAL DENIALS OF PETITIONER'S MOTIONS FOR MISTRIAL AND OTHER EVIDENTIARY ERRORS DENIED HIM A TRIAL IN ACCORD WITH TRADITIONAL AND FUNDAMENTAL STANDARDS OF DUE PROCESS.

In *Montana v. Egelhoff*, __ U.S. __, 116 S. Ct. 2013, 135 L. Ed. 2d 361 (1996), this Court considered whether the Due Process Clause was violated by a Montana statute which provided in part that voluntary intoxication could not be considered in determining the existence of a mental state which is an element of a criminal offense. In its decision, this Court carefully noted that the Due Process clause was not offended by the State statute in that instance, insofar that evidence may be excluded for a valid reason. The Respondent in that case had relied heavily on *Chambers v. Mississippi*, 410 U.S. 284, 294 S. Ct. 1038, 1045, 35 L. Ed. 2d 297

(1973), which stated that "[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." This Court held in *Chambers* that "[t]he exclusion of certain evidence, **coupled with** the State's refusal to permit [petitioner] to examine McDonald, denied him a trial in accord with traditional and fundamental standards of due process." 410 U.S. at 302, 93 S. Ct. at 1049. Although this Court in *Egelhoff* indicated that *Chambers* was an exercise in highly case specific error correction, it indicated that the holding of *Chambers*, if one can be discerned from such a fact intensive case — is certainly not that a defendant is denied a fair opportunity to defend against the State's accusations whenever critical evidence favorable to him is excluded, but rather that erroneous evidentiary rulings can, **in combination**, rise to the level of a due process violation.

Petitioner submits that this combination of erroneous rulings is exactly what combined to produce an unfair trial and deny Petitioner his Constitutional rights to due process and a fair trial in this case.

Initially, the trial court excluded the testimony of Petitioners expert on the issue of the disinhibiting effects of marijuana. The purpose of the proffered evidence was to allow the juror to consider why the victim had acted as he did no the day in question, a matter crucial to Petitioner's defense.

Although not by itself initially specifically identified at trial as an error of Constitutional magnitude, its' exclusion **combined with** the continued prejudicial occurrences resulting in the repeated motions for mistrial cited above denied Petitioner a fair trial. In her dissenting opinion in *Egelhoff*, Justice O'Connor, relying on *Chambers*, *supra*, *Crane v. Kentucky*, 476 U.S. 683, 690-691, 106 S. Ct. 2142,

2146-2147, 90 L. Ed. 2d 636 (1986), and *Washington v. Texas* 388 U.S. 14, 23, n.21, 87 S. Ct. 1920, 1925, 18 L. Ed. 2d 1019 (1967) indicated that "[t]hese cases, taken together, illuminate a simple principle: Due process demands that a criminal defendant be afforded a fair opportunity to defend against the State's accusations." In *Turner v. Louisiana*, 379 U.S. 466, 85 S. Ct. 546 (1965), this Court indicated that "A fair trial in a fair tribunal is a basic requirement of due process", citing *In re Murchison*, 349 U.S. 133, 75 S. Ct. 623, 99 L. Ed. 942 (1955). *See also Parker v. Gladden*, 385 U.S. 363 (1966).

Following *Egelhoff*, the Fifth Circuit, in *Little v. Johnson*, 162 F.3d 855 at 860 (5th Cir. 1998) ruled that ". . . *Chambers* and *Green* stand for the limited proposition that "certain egregious evidentiary errors may be addressed by the due process clause." citing *Barefoot v. Estelle*, 697 F.2d 593 (5th Cir. 1983).

Petitioner submits that the combination or errors which occurred in this case, culminating with the outrageous comment elicited from the State that the Defendant just ". . . shot [the victim] down like a dog." cries out for a "case specific error correction" of the due process violations that occurred during Petitioner's trial.

CONCLUSION

The case presents a question of monumental importance not only to the Petitioner in this case, who received a life sentence, but to those who believe that the criminal justice system and its ultimate conclusion, a jury trial, is a system designed to insure that a person charged with a crime should receive a "fair trial in a fair tribunal."

As noted in a portion of Petitioner's brief before the Georgia Supreme Court:

On the first day of trial, no less than three incidents occurred demanding a mistrial. The Court had already granted the Petitioner's motion to prohibit the use of the word "murder" insofar as this was the ultimate issue for the jury to determine. The prosecutor was aware of the trial court's position on this. Nonetheless, he "neglected" to inform their witness not to conclude that the case was a "murder" case, which is exactly what occurred . . . [l]ater that day, a member of the decedent's family engaged in the above referenced outburst in open court. Again, no mistrial was granted. Finally, the State was allowed to introduce testimony from it's own witness that the Petitioner just ". . . shot him [the decedent] down like a dog." Each of the above incidents, and certainly all of the above incidents taken together violated Petitioner's right to a fair trial, as well as his right to have his fate determined by impartial jurors. Repeated incidents of misconduct by the victim's family and the elicitation of improper and highly prejudicial and harmful statements by witnesses for the State, by the State, were permitted to occur. The Petitioner was entitled to a fair trial under the Constitutions of the United States and State of Georgia. The conduct of the State and the family of the deceased prevented that from occurring. Repeated incidents of outbursts, violations of Court orders, and the final extraordinarily prejudicial statement of the witness who stated that the decedent was shot down like a dog demand that the Petitioner be retried in an atmosphere free of the outrageous denials of the Sixth Amendment which occurred in this case. It is impossible to ask a jury to return a verdict of non-guilty while family members

parade inside the courtroom in pins, and shout encouragement to "helpful answers" of the witnesses, where the State violates a Court order in eliciting the word "murder" which just happens to be the ultimate issue of fact for the jury, and where finally a witness testifies that the decedent "was shot down like a dog." Any of these incidents should entitle the defendant to a reversal. It is critical to note that the Petitioner did not cause any of these problems. The trial atmosphere and the combined effects of these incidents demand the reversal of Petitioner's conviction. We know that this case was tried in 1997 in Dekalb County, Georgia. We pride ourselves on living and working in a State where we live by rules that require the accused, whether it be this Petitioner or any other Petitioner, to receive a fair trial. It simply didn't happen in the case at bar.

Accordingly, the Petitioner requests that his Petition for Writ of Certiorari be granted.

Respectfully submitted,

ROBERT H. CITRONBERG
Attorney for Petitioner
Suite 1950
100 Peachtree Street, N.W.
Atlanta, Georgia 30303
(404) 522-7450

APPENDIX A — OPINION OF THE SUPREME COURT OF GEORGIA DATED AND DECIDED MARCH 1, 1999

In the Supreme Court of Georgia

Decided: MAR 1 1999

S98A 1888. JAMES v. THE STATE

BENHAM, Chief Justice.

This appeal is from the felony murder conviction of Levy James, III.[1] On the day of the killing, James drove to the shoe repair establishment owned by his friend Steven Hood, and parked his car blocking the drive-through window. After Hood asked James three times to move the car, the men argued and Hood threatened James with physical violence. James got into his car as the argument continued, and when the unarmed Hood walked up to the car, shot him eight times, three of which shots would alone have been fatal.

1. The evidence adduced at trial was sufficient to authorize a rational trier of fact to find James guilty of felony

---

1. The shooting occurred on April 24, 1996, and James was indicted for malice murder and felony murder in a true bill returned on June 4, 1996. A trial begun on January 15, 1997, resulted in his conviction for felony murder on January 18, for which he was sentenced on that same day to life imprisonment. His motion for new trial, filed January 29, 1997, and later amended, was denied on July 7, 1998. A notice of appeal was filed on July 27, 1998; the appeal was docketed in this Court on August 24, 1998; and the appeal was submitted for decision after oral argument on November 10, 1998.

murder beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307 (99 SC 2781, 61 LE2d 560) (1979); *Cole v. State*, 254 Ga. 286 (329 SE2d 146) (1985).

2. James enumerates as error the trial court's exclusion of expert testimony proffered by James on the subject of the effect marijuana use may have had on the victim. The evidence was intended to bolster James's claim that his shooting of Hood was an act of self defense. The expert witness testified in the defense's proffer that evidence of marijuana use was found in Hood's blood; that the amount found indicated use within a few hours before death, or indicated regular use and use within several days before death; and that marijuana use can have a disinhibiting function. On cross-examination, the witness admitted that there was no way to know whether Hood was actually under the influence of marijuana at the time James shot him. On redirect examination, the witness stated that he could not say what, if any, effect marijuana had on Hood at the time of his fatal argument with James. There was no evidence that Hood had smoked marijuana on the day of his death, the only evidence of his use being that he was a regular user. After considering that evidence, the trial court excluded the evidence as being too speculative.

That ruling is supported by the holding in *Hawes v. State*, 261 Ga. 64 (4) (402 SE2d 714) (1991), where, as here, the defense could not demonstrate how the use of drugs contributed to behavior of the victim that would have been relevant to James's justification defense. James was unable to show in his proffer that Hood had been using marijuana at a time close enough to the shooting to have had an

influence on him at the time of the shooting. Under those circumstances, the evidence of marijuana use was not relevant and properly excluded. Id.

3. During cross-examination of an eyewitness, defense counsel asked the witness to refresh his recollection with a statement the witness had given to the police. Defense counsel then contested several parts of the witness's trial testimony, asking at one point whether, since he was now testifying differently, the witness had been mistaken when he gave the statement. After cross-examination, the trial court permitted the State, over defense objection, to have the witness read the whole statement. Contrary to James's argument on appeal, that ruling was not error because where, as here, the veracity of a witness is at issue, and that witness is present at trial, under oath, and subject to cross-examination, the prior consistent out-of-court statement of the witness is admissible. *Edwards v. State*, 255 Ga. 149 (2) (335 SE2d 869) (1985).

4. James contends on appeal that the trial court erroneously denied his motions for mistrial on four occasions: when members of the victim's family appeared in the courtroom wearing pins showing the victim's dates of birth and death; when a police officer, in testifying, used the word "murder," which the trial court had forbidden; when a spectator in the courtroom called out in agreement with a witness's statement; and when a witness said, of James and the victim, "he just shot him down like a dog."

Whether to grant a motion for mistrial is within the sound discretion of the trial judge, and a decision based on

that discretion will not be disturbed on appeal unless abuse of discretion is shown. *Isaac v. State*, 269 Ga. 875 (3) (505 SE2d 480) (1998). A review of the record persuades us that no such abuse occurred in this case: the trial court ascertained that no juror had seen the message on the pins and admonished Hood's family not to wear the pins in the courtroom; the trial court determined that the witness's use of the word "murder" was inadvertent, and offered curative instructions which the defense declined; after the outburst by a spectator, the trial court instructed the jurors to disregard any outbursts and cautioned the spectators against any further disruption of the trial; and in response the witness characterizing James's action as shooting Hood down "like a dog," the trial court cautioned the jury that witnesses were called to testify to their observations, not their evaluations, and instructed the jury to disregard the comment the witness tacked onto his observations. Given the trial court's curative efforts, the inadvertent nature of the witnesses' remarks, and the lack of apparent prejudice, we find no abuse of discretion in the denial of James's motions for mistrial.

5. The trial court did not err in permitting the State to have Hood's fiancee identify a picture of him in life. "The general rule is that it is not error to admit a photograph of the victim while in life. [Cit.] However, the better practice is not to permit a victim's family member to identify the victim where other nonrelated witnesses are able to do so . . . . [Cit]" *Ledford v. State*, 264 Ga. 60 (14) (439 SE2d 917) (1994). Although the witness in this case was not a family member, she lived with Hood and referred to him in her testimony as the person she loved. Under those

circumstances, the trial court's decision to permit her to make the identification was subject to the criticism made in *Ledford*. However, there is no suggestion in the record that there was another witness less closely affiliated with Hood available to make the identification, and our review of the record persuades us that the identification by Hood's fiancee did not produce such an emotional display as might deprive James of a fair trial.

6. James sought to introduce as part of his showing of Hood's propensity for violence a document by which Hood settled a domestic violence matter. Since the trial court permitted testimony establishing the facts of the domestic violence incident, including Hood's prosecution and the settlement of that prosecution, the document would have been merely cumulative. "It is not error to exclude otherwise relevant evidence if its probative value is substantially outweighed by considerations of avoiding the needless presentation of cumulative evidence from which the jury might or might not draw a certain inference [Cit.]" *Green v. State*, 218 Ga. App. 648 (2) (463 SE2d 133) (1995). Because the document in question would have given the jury no information not already provided by other evidence concerning the incident, we find no error in the trial court's exclusion of it from evidence.

7. After the jury had retired to deliberate, it asked the trial court for anatomical charts the medical examiner had used to illustrate testimony regarding the location of Hood's wounds. The defense had earlier objected to the charts going out with the jury on the ground that the charts were "demonstrative evidence." The trial court admitted the

charts into evidence and sent them to the jury over James's objection.

James now enumerates that decision as error, contending that numbers written on the charts may have caused the jury to believe the wounds were inflicted in that order when there was no testimony to that effect, and that permitting the exhibits to go to the jury amounted to sending the State's argument into the jury room unrebutted. The first objection has no merit because the medical examiner testified clearly that he had no way of knowing the order in which the wounds were inflicted and that the numbers were there for his convenience only. Under those circumstances, we do not believe the jury could have been confused by the numbers on the charts. The other objection amounts to a "continuing witness" objection, which is not applicable to drawings or other documents which are "demonstrative evidence that serve only to illustrate testimony given by the witnesses." *Gabbard v. State*, 233 Ga. App. 122 (3) (503 SE2d 347) (1998). We find no error in the trial court's decision to send the charts to the jury room.

8. James contends the trial court erred in refusing to strike for cause a juror who stated that he felt the use of a gun to take another's life would not be justified under any circumstances. However, the juror also stated that his feelings about gun use were personal to him, that self-defense was a circumstance under which taking a life would be justifiable, and that he would be able to consider the issues in this case impartially notwithstanding his personal principles regarding gun use. Since the witness clearly did not hold so fixed an opinion that he would be unable to set

aside his personal feelings and decide the case on the evidence, we find no abuse of the trial court's discretion. *Mize v. State*, 269 Ga. 646(6a) (501 SE2d 219) (1998); *Holmes v. State*, 269 Ga. 124 (2) (498 SE2d 732) (1998).

9. James's contention that the trial court erred in giving a sequential change on murder, felony murder, and voluntary manslaughter as is forbidden in *Edge v. State*, 261 Ga. 865 (414 SE2d 463) (1991), is controlled adversely to him by *Hill v. State*, 269 Ga. 23 (3) (494 SE2d 661) (1998). There, as here, the trial court defined the three offenses and then explained the various verdicts that could be returned.

> Analyzing the trial court's charge in this case as a whole, as we must, we find that the charge was not impermissibly sequential. The charge regarding voluntary manslaughter was complete, and makes no indication that it could be considered only after malice and felony murder had been eliminated as possible verdicts. Similarly, nothing about the portion of the charge regarding the verdict form . . . precluded the jury's consideration of provocation or passion unless and until it found Hall not guilty of felony and malice murder.

Id. at 26. We note additionally that the trial court in the present case told the jury in the charge on voluntary manslaughter that it would not be authorized to return a verdict for malice murder or felony murder without first determining whether mitigating evidence, if any, would cause the offense to be reduced to voluntary manslaughter.

The charge was not, therefore, subject to the criticism to which the charge in *Edge* was subject.

10. James argues on appeal that the following portion of the jury instruction may have confused the jury regarding the State's burden of proof:

> No person shall be convicted of any crime unless and until every element of the alleged offense is proven beyond a reasonable doubt. The object of all legal investigation is the discovery of the truth, and the burden of proof rests upon the State to prove every material allegation of the indictment and every essential element of the crime charged beyond a reasonable doubt.

James does not explain how that charge could confuse the jury into thinking the State's burden of proof was less than beyond a reasonable doubt and we are unable to discern how that might be so. We note that a charge in almost identical language was found in *Gavin v. Vasquez*, 261 Ga. 568, 569 (407 SE2d 756) (1991), to be a sufficiently clear statement of the State's burden of proof. The giving of the charge in this case was not error.

11. The trial court did not err in giving the jury its instructions in writing after having charged the jury verbally. *Anderson v. State*, 262 Ga. 26 (3) (413 SE2d 732) (1992).

12. On appeal, James complains of several portions of the State's closing argument. At trial, however, he

complained of only one portion, requesting a mistrial as to that allegedly improper argument. Since this is not a case in which the death penalty has been imposed, appellate consideration of other portions of the argument was waived by James's failure to object to them at trial. *Metts v. State*, __ Ga. __ (Case No. S98A1785, decided February 8, 1999). The one portion of argument to which James did object was a reference to the deprivations Hood's family would suffer due to his absence. Argument which evokes sympathy for the family of a victim is not necessarily improper. "In fact, we have held that it is not error to remind the jury that family members of the victim do not now have a mother, wife or sister." *Dupree v. State*, 267 Ga. 38 (3) (472 SE2d 299) (1996). We conclude that the trial court did not abuse its discretion in denying James's motion for mistrial. *Isaac v. State*, supra.

Judgment affirmed. All the Justices concur, except Carley, J., who concurs in judgment only as to Division 5, and Hines, J., who concurs in judgment only as to Division 2.

APPENDIX B — EXCERPTS FROM TRIAL TRANSCRIPT

[commencing at page 162]

* * *

MR. CITRONBERG: JUDGE, I THINK — I THINK THE STATE'S ARGUMENT MISSES THE POINT. I THINK THAT DR. HOLBROOK WOULD TESTIFY THAT IT IS A POTENTIAL, STUDIED RESULT OF MARIJUANA INGESTION BEING DISINHIBITION OF BEHAVIOR.

MR. JAMES TESTIFIED, I BELIEVE, IN RESPONSE TO CROSS-EXAMINATION, HE HAD NEVER SEEN STEVEN HOOD ACT [163] LIKE THIS BEFORE. NOW, MR. HOOD HAS ACTED LIKE THIS BEFORE. WE DON'T KNOW WHEN MR. HOOD INGESTED MARIJUANA AND WHEN HE DIDN'T. WE KNOW IT WAS WITHIN THREE DAYS, AND I SUGGEST THAT COCAINE STAYS IN THE BLOODSTREAM THREE DAYS, AS WELL. AND HE SAYS WE'RE NOT GOING TO ARGUE ABOUT THE COCAINE, THEN WE SHOULDN'T ARGUE ABOUT THE MARIJUANA, EITHER.

IT WAS IN HIS BLOOD STEAM. IT CAN CAUSE A DISINHIBITION OF BEHAVIOR, WITH A RESULTED INCREASE TOWARD IRRATIONAL BEHAVIOR AND VIOLENCE.

THAT TESTIMONY WAS VERY, VERY CLEAR.

WE'RE NOT SIMPLY THROWING IN THIS GUY WAS A MARIJUANA USER. BECAUSE, IF I WAS GOING TO DO THAT, I WOULD HAVE ASKED THOSE QUESTIONS. BUT I DIDN'T. IT'S VERY SPECIFIC, AND WE HAVE A VERY SPECIFIC REASON FOR IT, WHICH IS WHAT THE LAW ALLOWS. COULD IT HAVE AFFECTED THIS CASE? IS THERE A REASON FOR IT? AND WE ARGUED THAT, BASED ON MR. JAMES' TESTIMONY, AND BASED ON WHAT DR. HOLBROOK SAID, THIS IS CLEARLY ADMISSIBLE.

THE COURT: OKAY. BASED ON WHAT I'VE HEARD, I THINK IT'S INADMISSIBLE. I THINK IT'S MUCH TOO SPECULATIVE. IT COULD BE THAT YOU COULD MAKE OUT A CASE FOR IT THAT MIGHT BE APPROPRIATE, BUT YOU HAVEN'T DONE IT SO FAR. SO I'M RULING ON WHAT I HAVE . . .

* * *

[642] * * *

MR. CITRONBERG: DURING THE CROSS-EXAMINATION OF MR. DURHAM, AT ONE POINT, THERE WAS AN OUTBURST FROM

THE AUDIENCE IN RESPONSE — I THINK THE WITNESS SAID, ONE OF MY CLOSEST FRIENDS GOT SHOT, AND ONE OF THE FAMILY MEMBERS OF THE VICTIM ANNOUNCED CLEARLY, YES, THAT'S RIGHT. IN MY HEARING, IF I COULD HEAR WHERE I WAS, I HEARD, YES, THAT'S RIGHT. I DON'T KNOW WHETHER YOUR HONOR HEARD IT.

THE COURT: I HEARD SOMETHING, BUT, FRANKLY, THE T.V. IS IN THE WAY, AND I COULDN'T SEE MUCH.

MR. CITRONBERG: I KNOW THE STATE COULD HEAR IT.

I GUESS IT'S MOTION FOR MISTRIAL NUMBER FOUR THAT DEALS WITH ARGUMENTS THAT WE RAISED IN MOTIONS. I THOUGHT WE HAD A RULING ON IT. WE'D AGAIN MOVE FOR A MISTRIAL. THE STATE WAS SUPPOSED TO HAVE INSTRUCTED THE FAMILY, AND YOUR HONOR INSTRUCTED THE FAMILY, THERE ARE TO BE NO OUTBURSTS. WE THINK IT'S PREJUDICIAL. IT'S CONTINUING TO DENY MY CLIENT HIS [643] RIGHT TO A FAIR AND IMPARTIAL TRIAL, A FAIR TRIAL AND IMPARTIAL JURY, AND WE OBJECT UNDER THE 5TH, 6TH, AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND

CORRELATIVE WITH GEORGIA PROVISIONS AND STATE STATUTORY PROVISIONS, AS WELL. AND WE MOVE FOR A MISTRIAL.

THE COURT: MR. STATHAM?

MR. STATHAM: WELL, I THINK IT WAS — IT WAS SOME — THAT'S — I DON'T DISAGREE WITH WHAT DEFENSE COUNSEL JUST SAID HAPPENED. HE FORGOT TO SAY THAT IT WAS IN RESPONSE TO ONE OF THE MOST AWFUL CROSS-EXAMINATIONS I'VE EVER HEARD, WHERE I THINK EVERYBODY IN THE COURTROOM WAS READY TO STRANGLE THE QUESTIONNAIRE [SIC].

THE COURT: WELL, LET'S DON'T GET INTO THAT.

MR. STATHAM: WELL, I UNDERSTAND.

BUT UNDERSTAND THAT'S WHAT IT WAS IN RESPONSE TO, I MEAN, THESE PEOPLE HAVE SAT AND LISTENED TO FOUR EYEWITNESSES TALK ABOUT THEIR SON AND BROTHER GET KILLED, AND THAT ONE COMMENT, BECAUSE THE GUY CAN'T EVEN GET AN ANSWER IN ON CROSS, I MEAN, IT WAS UNDER THOSE CIRCUMSTANCES THAT IT HAPPENED, SO I UNDERSTAND.

Appendix B

MR. CITRONBERG: JUDGE —

THE COURT: WELL, I'M GOING TO DENY THE MOTION [644] FOR THE MISTRIAL. I'M GOING TO INSTRUCT THE JURY TO DISREGARD ANYTHING THAT HAPPENS IN THE COURTROOM. AND, WHEN I COME BACK IN, I'M GOING TO TELL THE PEOPLE AGAIN, THE NEXT WORD THAT IS SAID BY ANYBODY OUT THERE AUDIBLY, THEY'RE GOING TO BE EJECTED FROM THE COURTROOM.

* * *

[659] A. STEVE SAID, WELL, BUST ME THEN. AND BY THIS TIME, I SAID, WELL, THEY MUST BE SERIOUS. AND THEN I SAW A PISTOL, AND I KIND OF STEPPED BACK. SO STEVE, ON THE WAY TOWARDS THE CAR — I DON'T KNOW WHY STEVE PROCEEDS TOWARD THE CAR, AND AS HE WAS COMING TOWARDS THE CAR, HE BEGAN TO SHOOT HIM. AND I DUCKED DOWN. I TOLD MY WIFE TO GET DOWN. AND I WAS — I STARTED CRYING, BECAUSE I KNEW THE GUY, AND IT WAS LIKE, I THOUGHT IT WAS JUST A LITTLE ARGUING OR WHATNOT. AND HE — I DON'T KNOW, HE JUST SHOT HIM DOWN LIKE A DOG.

Q. OKAY.

MR. CITRONBERG: EXCUSE ME. YOUR HONOR, CAN WE APPROACH?

THE COURT: YES, SIR.

(WHEREUPON, AN OFF-THE-RECORD DISCUSSION WAS HELD AT THE BENCH BETWEEN COURT AND COUNSEL.)

THE COURT: LET ME ASK YOU TO GO TO THE JURY ROOM, LADIES AND GENTLEMEN.

(WHEREUPON, THE JURY RETIRED FROM THE COURTROOM AT 4:09 P.M.)

MR. CITRONBERG: YOUR HONOR, PERHAPS WE CAN EXCUSE THE WITNESS WHILE WE'RE DISCUSSING THIS?

THE COURT: YES, SIR.

IF YOU WILL HAVE A SEAT, PLEASE, OUT IN THE HALL, PLEASE, SIR?

THE WITNESS: YES, SIR.

[660] (WHEREUPON, THE WITNESS STEPPED OUT INTO THE HALLWAY.)

THE COURT: YES, SIR?

MR. CITRONBERG: JUDGE, I DON'T GET IT. I DON'T — I DON'T GET IT. I — THIS IS A CONTINUING PROBLEM HERE. THIS IS THE

Appendix B

WORST AND THE LATEST OF THE CONTINUING LINE OF ANSWERS ELICITED IN VIOLATION OF COURT ORDERS, IN VIOLATION OF MOTIONS.

NOW WE HAVE A WITNESS SAYING, "HE SHOT HIM DOWN LIKE A DOG." NOW I KNOW WHEN I PREPARE A WITNESS, IF I WAS IN THE STATE, I WOULD MAKE SURE THAT THAT KIND OF COMMENT WASN'T TESTIFIED TO, PARTICULARLY NON-RESPONSIVELY TO A QUESTION.

HOW MUCH MORE? THIS IS — THIS IS SO PREJUDICIAL, IT'S UNBELIEVABLE. IT'S ABSOLUTELY UNBELIEVABLE. "HE SHOT HIM DOWN LIKE A DOG." THERE'S NOT A WHOLE LOT ELSE I CAN SAY ANYMORE.

I DON'T KNOW WHAT THEY'RE TALKING TO THEIR WITNESSES ABOUT. I DON'T KNOW IF THEY'RE TALKING TO THEIR WITNESSES. THIS IS — THIS IS A TRIAL BY INUENDO, AMBUSH, AND OUTRAGE. WE CAN'T KEEP UP. IT'S NOT FAIR. IT'S JUST NOT FAIR.

WE'D MOVE FOR A MISTRIAL UNDER THE 5TH, 6TH, AND 14TH AMENDMENTS, GEORGIA CONSTITUTIONAL PROVISIONS AND STATUTORY PROVISIONS AND CASE LAW.

Appendix B

[661] "HE SHOT HIM DOWN LIKE A DOG?" COME ON.

THE COURT: MS. DOMINGUEZ?

MS. DOMINGUEZ: YOUR HONOR, WHEN WE HAD THE EARLIER MOTION THAT, NOT TO INSTRUCT ANYONE — INSTRUCT YOUR WITNESSES NOT TO SAY "MURDER", I WENT OUTSIDE, AND I TOLD MY WITNESSES, YOU CAN'T SAY THE WORD MURDER; OKAY? YOU CAN'T SAY ANYTHING LIKE THAT. YOU CAN'T SAY MURDER.

I MEAN, THE QUESTION I ASKED HIM WAS, WHAT HAPPENED NEXT? I BELIEVE THAT'S THE QUESTION I ASKED HIM. I MEAN, IF YOU GIVE A CURATIVE INSTRUCTION —

WE TALKED TODAY, AND WE DIDN'T TALK ABOUT HIM SAYING THIS. I JUST INSTRUCTED HIM NOT TO SAY THE WORD "MURDER", AND THAT'S WHAT YOUR HONOR INSTRUCTED ME TO DO EARLIER TODAY. YOU INSTRUCTED THE STATE, AND I RAN OUTSIDE, AND I TOLD HIM THAT. I TOLD HIM AND MR. DURHAM.

THE COURT: WELL, LISTEN, LET'S PUT ASIDE THE ISSUE OF WHO SAID WHAT,

WHO TOLD WHOM TO SAY WHAT, OR ANYTHING. I'M NOT SUGGESTING THAT YOU SUGGESTED THOSE WORDS. BUT LET'S JUST PUT THAT ASIDE.

IT'S BEEN SAID. THIS JURY HAS HEARD IT. WHAT'S THE IMPACT OF THAT? HE SAYS MISTRIAL. YOU SAY WHAT?

MS. DOMINGUEZ: YOUR HONOR, I THINK IT WOULD [662] HAVE BEEN THE SAME IMPACT IF HE HAD SAID, HE GUNNED HIM DOWN. I REALLY DO. I MEAN, HE SHOT HIM DOWN. JUST THE FACT THAT HE ADDED THE WORD "DOG". I REALLY DON'T THINK — I MEAN, THEY'VE HEARD NUMEROUS WITNESSES SAY THE SAME THING.

THIS IS THIS YOUNG MAN STATING WHAT HIS OPINION WAS, AND HE SAW THIS. I MEAN, HE WAS TELLING WHAT THE IMPACT IT HAD ON HIM. HE WAS SAYING HOW HE WAS CRYING, AND HE DUCKED DOWN, AND HE WAS BASICALLY TELLING US WHAT HE THOUGHT AND WHY. HE WAS JUST EXPRESSING HIS OPINION.

MR. CITRONBERG: JUDGE, THE REASON WE HAVE RULES OF EVIDENCE IS TO NOT TO HAVE, "HE SHOT HIM DOWN LIKE A DOG," HE BUTCHERED HIM LIKE A HOG, HE

HUNG HIM OUT TO DRY, HE SLAUGHTERED HIM LIKE A LAMB. THIS IS TESTIMONY FROM A WITNESS, ELICITED BY THE STATE OF GEORGIA. IT'S NOT PERMISSIBLE. IT'S OUTRAGEOUS. IT'S OUTRAGEOUS. WE'VE HAD IT ONCE ALREADY. THIS IS A LOT WORSE.

THE COURT: ALL RIGHT. I'M GOING TO RESERVE RULING ON THAT, AND WE'RE GOING TO PROCEED WITH THIS WITNESS' TESTIMONY.

MS. DOMINGUEZ: YOUR HONOR, MAY I BE EXCUSED TO GO OUTSIDE AND TELL HIM NOT TO SAY THAT AGAIN? I MEAN, HE HASN'T BEEN IN HERE FOR THIS. I'D JUST LIKE [663] TO INSTRUCT HIM NOT TO SAY THAT, OR ANYTHING LIKE THAT, AGAIN.

THE COURT: YES.

MS. DOMINGUEZ: OKAY. MAY I LEAVE?

THE COURT: (NODS AFFIRMATIVELY.)

(WHEREUPON, MS. DOMINGUEZ LEFT THE COURTROOM MOMENTARILY.)

MR. CITRONBERG: JUDGE, ARE YOU GOING TO STRIKE THAT COMMENT?

Appendix B

THE COURT: YES, SIR.

MR. CITRONBERG: JUDGE, I HAVE AN OBJECTION, EVEN IF YOU DO STRIKE IT. AND MY MOTION FOR MISTRIAL CONTINUES.

THE COURT: YES, SIR, IT DOES. AND MY RESERVATION OF THE MOTION CONTINUES PAST THAT.

* * * *

APPENDIX C — ORDER OF THE SUPREME COURT OF GEORGIA DENYING MOTION FOR RECONSIDERATION DATED MARCH 18, 1999

SUPREME COURT OF GEORGIA

Case No. S98A1888 Atlanta, March 18, 1999

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

LEVY JAMES, III v. THE STATE

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.